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No. 02-1756 *et al.*

IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES, NATIONAL ASSOCIATION OF MANUFACTURERS, AND ASSOCIATED BUILDERS AND CONTRACTORS, INC. *et al.*,
Appellants,

v.

FEDERAL ELECTION COMMISSION *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

REPLY BRIEF OF THE "BUSINESS PLAINTIFFS" CHAMBER OF COMMERCE OF THE UNITED STATES, NATIONAL ASSOCIATION OF MANUFACTURERS, AND ASSOCIATED BUILDERS AND CONTRACTORS, INC.

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CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement is included on page iii of the Business Plaintiffs' Jurisdictional Statement.

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The Business Plaintiffs submit this reply to the Brief For The Federal Election Commission, et al. ("FECBr.") and the Brief For Intervenor-Defendants Senator John McCain, et al. ("IntDefBr."), collectively the "Defendants."

I. DEFENDANTS DO NOT DISPUTE KEY ASPECTS OF THE BUSINESS PLAINTIFFS' BRIEF.

Strikingly, Defendants do not contest most of the key factual premises for the challenges to the electioneering communication and coordination provisions presented in the Business Plaintiffs' Brief ("BPBr.").[1] For example, **Defendants do not dispute that:**

- BCRA's electioneering communication standard targets and suppresses *independent* speech concerning issues and candidates. BPBr. 34-40.
- Business corporations are vitally affected by and interested in the formulation and implementation of federal legislation and policy and in assuring that their knowledge and concerns are fully and effectively communicated to the public and to federal officials. BPBr. 4, 16-17.
- All Americans, including American voters and government officials, have a vital interest in hearing what business corporations have to say on the key issues of the day. BPBr. 4.
- Because the electioneering communication standard focuses on electronic signals that do not respect political boundaries, the minimum 90 day blackout periods for mentioning candidate names in independent speech imposed by the primary definition of electioneering communication

[1] The Intervenor-Defendants have gratuituously cited certain confidential materials in their briefs. *See, e.g.*, IntDefBr. 47, 51. Not one of the district judges, in their lengthy opinions, saw any need to quote or cite this material, nor did the Solicitor General in his brief. Judge Kollar-Kotelly's May 2, 2003, Memorandum Opinion and Order declined to make the material public, 251 F. Supp. 2d 919 (D.D.C. 2003), and the Intervenor-Defendants elected not to appeal that ruling.

will be considerably extended for tens of millions of Americans to half the election year or more in some cases. BPBr. 5, 8-10.[2]

- Blackout periods mandated by the primary electioneering communication standard encompass times when important legislative developments often occur, and other major matters involving incumbent officeholders—urgently requiring public corporate comment—have and will occur. BPBr. 16-17.

- Americans tend to be most focused upon and receptive to discussions of public policy issues in months prior to elections, the very periods covered by the electioneering communication blackouts.[3]

- References to candidates in public speech serve important communicative functions independent of an electoral effect, such as (i) identifying bills, proposals, or policies; (ii) providing important and efficient cues as to the merits of such matters (*e.g.*, a "Kennedy tax bill" or a "Gingrich tax cut"); (iii) directing public response to involved public leaders; and (iv) persuading. BPBr. 16-18.

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[2] For example, New York City television and radio will be blacked out for their entire listening area by nominating events in New Jersey, Pennsylvania, and Connecticut; Washington, D.C., radio and television will be blacked out by nominating events in Maryland and Virginia. Users of satellite radio broadcasts and night-time clear channel AM broadcasts—*e.g.*, farmers and truckers—will be blacked out much of the election year by nominating events throughout the multistate region reached by those signals.

[3] The Intervenor-Defendants respond that broadcast time is more expensive during the pre-election period and "the airwaves are crowded with campaign ads." IntDefBr. 65. True enough. It also is true that a location in a busy mall often is more expensive than isolated space, and it is crowded with other stores, including competitors. Nevertheless, many businesses vie for mall locations. The fact is that it is easiest to sell a public policy idea to the public when people are most interested in public policy issues. BPBr. 16.

- Participation of business corporations and their representatives, such as the Business Plaintiffs, in developing, adopting, and implementing legislation and policy requires extensive, long-term communication and association with Members of Congress and other government and political leaders who are candidates or political party officials. These legislative and policy issues also become important in federal campaigns. BPBr. 13-15.

- Although BCRA's coordination provisions make coordinated speech unlawful and potentially criminal, the present law fails to provide clear guidance as to what types of association and communication with candidates or party officials will render corporate speech coordinated. BPBr. 46-48.

- Charges of unlawful coordination are commonly employed to punish and deter speech by political opponents. Such charges threaten serious burden and expense to the accused speakers, making them effective weapons. BPBr. 23-24.

- Business corporations and their representatives right now are limiting highly protected communication and association with federal officials and candidates to avoid burdensome charges that future corporate speech has been impermissibly coordinated and constitutes an unlawful contribution. BPBr. 29.

II. FAR FROM ACHIEVING WHAT *BUCKLEY* INTENDED, DEFENDANTS' ATTEMPT TO SUPPRESS ALL SPEECH LIKELY TO AFFECT AN ELECTION IS DIRECTLY CONTRARY TO *BUCKLEY* AND *MCFL*.

Buckley v. Valeo stressed that independent public speech concerning issues and candidates receives the very highest level of First Amendment protection. 424 U.S. 1, 42, 44-45 (1976). *Buckley* and subsequent cases have jealously safeguarded such independent speech, rejecting claims that it causes or appears to cause *quid pro quo* corruption or that such independent persuasive efforts may create constitution-

ally unacceptable political debts. *Buckley*, 424 U.S. at 45-47, *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497-98 (1985); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 616-18 (1996).[4] Only in the very narrow context of speech that places itself at the heart of the electoral process by using explicit words to expressly advocate voting for or against clearly identified candidates has this Court allowed such speech to be suppressed. *Compare FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 248-49 (1986) ("*MCFL*") (applying express advocacy standard to burdens on corporate speech supporting candidates), *with First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1977) (independent corporate discussion of issues may not be suppressed). And suppression of express advocacy has been allowed only on the claim that permitting corporations to deploy immense aggregations of wealth would seriously distort the electoral process. *See Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659-60 (1990).[5]

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[4] Defendants' claim that independent speech imposes burdens of gratitude that corrupt candidates is flawed. FECBr. 88-89; IntDefBr. 54-56. Candidates generally *dislike* independent speech. *See, e.g.*, 147 Cong. Rec. S3043 (daily ed. Mar. 28, 2001) (statement of Sen. Snowe: "I want to control my own campaign."). There is no evidence that independent speech is particularly likely to create gratitude. Of the wide range of acts that might induce gratitude, BCRA suppresses independent speech—the activity with the greatest claim to constitutional protection. There is no public perception or evidence that candidates tend to be crippled by gratitude for yesterday's favors.

[5] *Austin*'s unique holding cannot be extended beyond express advocacy. Its legal premise—that the choice of the corporate form may be conditioned on giving up core rights—is a classic example of an unconstitutional condition. *See Speiser v. Randall*, 357 U.S. 513 (1958). And the corporate characteristics *Austin* relied upon—limited liability, perpetual life, and favorable treatment of the accumulation of assets, 494 U.S. at 658—now also characterize a wide range of other entities, including law firms. Wealthy individuals, including those who are identified with, and whose wealth derives from, corporations, *e.g.*, Warren Buffett and Senator Jon Corzine, are active politically, both in supporting speech and as candidates. At the same time, many campaigns now are incorporated. *See* 11 C.F.R. § 114.12. Moreover, because *Austin*'s rationale would not reach unions, which often take opposite positions from corporations, expanding *Austin* would threaten a lopsided regime Congress could not have intended.

Buckley treated contributions differently than independent speech, allowing considerably greater scope for regulation. 424 U.S. at 20-21. This key distinction has been carefully maintained. *See FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 440-42 (2001). The recent *Beaumont* decision, so heavily relied upon by the Defendants, emphasized this distinction and stressed that it was dealing with limits on contributions, not independent speech. *FEC v. Beaumont*, 123 S. Ct. 2200, 2207, 2210 (2003).[6]

BCRA's new electioneering communication standard goes far beyond this Court's precedents, seeking to suppress a wide range of *independent* speech during much of each even-numbered year. Nevertheless, Defendants claim that the electioneering communication standard really does nothing more than achieve what *Buckley* originally intended. FECBr. 81-83; IndDefBr. 61-62. The Defendants' arguments boil down to: the *Buckley* Court really meant to allow suppression of all speech likely to affect an election, but it adopted a naïve standard that turned out to be subject to unforeseen circumvention. Thus, Defendants suggest that the electioneering communication provisions merely restore a degree of tailoring that *Buckley* already held to be acceptable. *Id.*

This is revisionism at its worst. In fact, *Buckley was emphatic that its express advocacy standard would not and was not intended to encompass all or most speech likely to affect a federal election.* Defendants are asking this Court to

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[6] Furthermore, in response to questions from Justice O'Connor during oral argument in the *Beaumont* case, the FEC explained that BCRA did not affect the statute that was directly at issue in that case. *See* Oral Arg. Tr. in No. 02-403, 2003 WL 1798493, *14.

overturn Buckley, not to restore or implement it. And they similarly are attacking *MCFL*.

In developing the express advocacy standard, *Buckley* explained: "Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions," so that "[d]iscussions of those issues . . . tend naturally and inexorably to exert some influence on voting." 424 U.S. at 42-43 (citations omitted). As a result, *Buckley* observed that there was little difference "in practical application" between issue advocacy and candidate advocacy, *id.* at 42, and that both types of speech were likely to affect elections. *Buckley* also recognized that persons intent on promoting or opposing candidates easily could craft speech that would do so without using explicit words of express advocacy. *Id.* at 45. *Buckley* said that it "would naively underestimate" political speakers to believe that they required express advocacy to craft speech that "benefited the candidate's campaign." *Id.* Yet, *Buckley* would only permit limited regulation of independent speech, that which used explicit words to expressly advocate the election or defeat of a clearly identified candidate. *Buckley*'s goal thus was *not* to regulate all or most speech likely to affect elections, but, instead, to clearly identify a *narrow category of speech directly and unambiguously tied to an election*—express advocacy.

A decade later, *MCFL* reinforced these points. It quoted *Buckley*'s observation that there is little difference "in practical application" between discussing issues and electoral advocacy. 479 U.S. at 249. It said that *Buckley* did not seek to regulate all campaign advocacy, but only "more pointed exhortations" that employ express advocacy. *Id.* It stressed that the express advocacy standard was crafted to prevent "overbreadth." *Id.* at 248. In short, *MCFL* achieved narrow tailoring by *deliberately* excluding from suppression a wide range of speech that it knew was likely to influence elections.

Defendants also claim that, whatever *Buckley*'s intent, the electioneering communication standard merely restores the

tailoring that the express advocacy standard originally achieved. FECBr. 90-96; IntDefBr. 56. That claim lacks empirical support. Although Defendants claim that today's campaign speech often omits any express advocacy, they ignore that virtually all such speech must include disclaimers identifying the sponsor, which often embody express advocacy, *e.g.*, "Paid for by the Smith for Congress Committee." *See* 47 C.F.R. § 73.1212; 11 C.F.R. § 110.11. Thus, most current campaign speech contains express advocacy. But be that as it may, *Defendants cite no evidence that, at the time of Buckley and MCFL, most political speech likely to affect elections contained express advocacy*, and the Business Plaintiffs know of no such evidence.

In sum, *Buckley* and *MCFL* rejected as "overbroad" any effort to suppress or limit all speech likely to affect an election. Instead, given the highly protected status of such speech, they narrowed the provisions at issue so that they regulated only speech that, by its explicit terms, was directly and unambiguously part of the election process. Because the electioneering communication standard attempts a much broader scope of regulation—one that *Buckley* and *MCFL* reject—it is not narrowly tailored and must be struck down.

III. BECAUSE THE ELECTIONEERING COMMUNICATION STANDARD SUPPRESSES CORE SPEECH, IT IS SUBJECT TO STRICT SCRUTINY.

Defendants acknowledge that the effect of BCRA is to deny corporations and other speakers "the most effective means of communicating" to "the largest audience." FECBr. 93. Defendants' assertions that Title II "does not ban any speech whatever," FECBr. 97, IntDefBr. 9, 43, 56, thus are misleading at best. Defendants do not deny that, during periods of three to six months or more in every even-numbered year, corporations that broadcast a public message that mentions a Member of Congress or an incumbent

President who is seeking re-election face serious penalties, potentially including criminal liability.[7] Nor do they deny that the electioneering communication standard is intended to and will *substantially* reduce the total amount and effectiveness of corporate speech on public issues. Indeed, Defendants seek to justify the electioneering communication standard precisely as a way of effectively suppressing a great deal of such speech. FECBr. 80-81; IntDefBr. 53-54.

What Defendants mean by "no ban" is that corporations are "not absolutely gagged." Corporations may speak only in ways that Congress deems sufficiently burdensome, inefficient, and ineffective that total corporate speech will be greatly reduced.[8] When Alabama's law forbade "electioneering" one day a year—election day—this Court saw a fundamentally objectionable "suppression" of core speech, and it questioned whether the fact that the suppression occurred only one day was even "relevant to the constitutionality of the law." *Mills v. Alabama*, 384 U.S. 214, 219-20 (1966).

[7] Tucked away in a footnote is an assertion that the "hypothetical threat of criminal prosecutions" serves more as a scarecrow than as a living threat. FECBr. 104 n.43. But it is the scarecrow function of such criminal provisions that is problematic. A prudent corporate executive will be particularly reluctant to authorize corporate speech that may be described, however hypothetically, as exposing the corporation to criminal liability. Thus, the chilling effects will occur. We must presume that Congress included the criminal provisions for a purpose and that this or some future administration may well enforce them. Defendants offer no assurance that they will not do so.

[8] The Court previously has recognized that creating and maintaining corporate PACs is a "severely demanding task" and is not an effective substitute for direct corporate speech. *MCFL*, 479 U.S. at 255-56. Because organizing a PAC and raising its funding takes time, it is an utterly impractical vehicle for corporations who speak only occasionally in response to unpredictable events. Moreover, because only PAC funds can be contributed to federal candidates and political parties, and those funds must be raised in limited amounts, 2 U.S.C. § 441a(a), restricting spending for speech to the artificially constrained resources of PACs forces corporations to trade off speech expenditures against contributions.

Defendants hint that the blackout periods are mere "time, place, and manner" restraints, but that position cannot be sustained. *See Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93-94 (1977). *Linmark* unanimously held that an ordinance forbidding "For Sale" signs in front of houses was *not* a time, place, or manner restriction. This was because the "primary effect" that the ordinance sought to avoid did not derive from the particular media being suppressed—*e.g.*, the size, shape, or location of the signs—but from the content being communicated. *Id.* at 94. Moreover, other means of communication "involve[d] more cost and less autonomy" in "less effective media." *Id.* at 93. Similarly, BCRA seeks to regulate the message being conveyed and the type of speaker, not the method of communication. Corporate broadcasts on commercial subjects—"commercials"—thus are not restricted. And BCRA is deliberately aimed at types of speech deemed most effective, relegating speakers to less effective means. FECBr. 114. It is *not* a "time, place, and manner" restriction, but rather a content-based suppression of independent speech.

The Business Plaintiffs call this a "ban," and so do BCRA's sponsors outside the courtroom.[9] But the issue is moot since even Defendants acknowledge that the electioneering communication standard triggers strict judicial scrutiny, requiring Defendants to prove narrow tailoring and First Amendment clarity. FECBr. 24, 85; IndDefBr. 56, 63.

IV. DEFENDANTS FAIL TO SHOW THAT THE ELECTIONEERING COMMUNICATION PROVISIONS ARE NARROWLY TAILORED.

Defendants mistakenly argue that, because the Constitution grants Congress authority to regulate federal elections, Congress has "broad leeway" to regulate speech that is "likely to

[9] *See, e.g.*, 147 Cong. Rec. S2712 (daily ed. Mar. 22, 2001), S3034-35 (daily ed. Mar. 28, 2001) (statements of Sen. Snowe).

influence" a federal election. FECBr. 78.[10] Whether Congress's elections power actually sweeps so broadly is addressed by the Title I briefs. But even assuming that the basic power is that broad, it does not follow that Congress may freely *suppress* highly protected independent speech that happens to fall within the power's outer boundaries. To the contrary, Defendants concede that First Amendment strict scrutiny applies. FECBr. 85; IndDefBr. 63. The whole point of such strict scrutiny is to narrowly and stringently limit otherwise permissible regulation when it impacts fundamental rights or suspect categories. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). Congress has no "broad leeway" to suppress core speech, and no precedent from this Court suggests otherwise.

This distinction between a basic power to regulate and the power to suppress speech is clearly drawn in cases concerning judicial control of litigation-related speech by lawyers. Because lawyers are officers of the court and owe a fiduciary obligation to the system of justice, their professional speech is well within the basic authority of the courts. Even so, the courts have no broad leeway to suppress out-of-court statements. To the contrary, "the substantive evil must be extremely serious *and the degree of imminence extremely high* before utterances can be punished." *Wood v. Georgia*, 370 U.S. 375, 384 (1962) (quoting *Bridges v. California*, 314 U.S. 252, 263 (1941)) (emphasis added).[11]

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[10] Defendants actually use a variety of phrases. Sometimes the reference is comparative, targeting speech "most likely to influence" an election. FECBr. 92. Other times the reference is to speech that "in all likelihood ha[s] the effect of influencing." FECBr. 92-93. Whether the speech must merely affect the policy views of one voter or whether it must alter the outcome is not clear.

[11] This Court generally has ruled that public "discussion of the problems of society" may be suppressed only when the speech presents "an imminent, not merely a likely threat [that is not] remote, or even probable [but] must immediately imperil." *Wood*, 370 U.S. at 384-85 (internal quotations and citations omitted). The general issue was recently reviewed in *Karhani v. Meijer*, No. 03-CV-71654-DT, 2003 WL 21554338 (E.D. Mich. June 6, 2003). The court collected and discussed cases for the proposition that there must be "much more than a . . . reasonable likelihood" of "a grave threat." *Id.* at *6 (internal citations and quotations omitted).

In seeking to achieve clarity, the primary definition of electioneering communication adopts procrustean terms that are far from tailored. The key basis for suppression—a mere reference to a candidate, including an incumbent President, Senator, or Member of Congress—is not evil or troubling in itself.[12] To the contrary, the First Amendment was adopted to protect just such references. *Buckley*, 424 U.S. at 40-44.

As noted above, Defendants do not dispute that corporations have important information to impart on public policy issues, and Americans and their leaders have a strong need to receive such information. Nor do Defendants dispute that references to political leaders, including incumbent Members of Congress or the President, are an important part of such speech. Thus, *the criterion of a candidate reference, in itself, serves as much to identify speech that merits special First Amendment protection as it does to suggest any basis for suppression.* Such a criterion may contribute to a tailored standard, as it does in the express advocacy context, but in itself it certainly is not a narrow and tailored means of identifying speech that merits suppression. Certainly merely referring to a candidate does not establish a "substantive evil" that is "extremely serious" with an "imminence [that is] extremely high." *See Wood*, 370 U.S. at 384.

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[12] Nor, for that matter, is the standard of referring to a candidate clear on its face. Is a reference to an office held by a candidate, or to an act of the candidate as a function of the candidate's office a sufficient reference? *Buckley*'s express advocacy standard required that the speech itself clearly identify the candidate. 424 U.S. at 43. Some such narrowing construction would have to apply to the electioneering communication standard if it otherwise were to survive.

The so-called "targeting" provisions do not provide the needed tailoring. The minimum blackout period in each state—90 days for congressional candidates and 120 days for major party presidential candidates due to the national nominating conventions (BPBr. 9)—is a lengthy period of time. And the actual blackout periods in many jurisdictions will be much longer—approaching half a year or more for the many tens of millions of Americans who live within 80 to 100 miles of 50,000 residents in another jurisdiction or two. *See* BPBr. 5, 8-10.

Nothing about those lengthy periods makes them unimportant from a First Amendment viewpoint. To the contrary, Defendants do not dispute that legislation often reaches critical phases toward the end of the session, which often overlaps the blackout periods. Nor do Defendants deny that national and world events calling for important government action have occurred and will occur during those times.

Indeed, although Defendants quarrel over the exact numbers, their own evidence indicates that a substantial amount of speech in the 60 days before the 1998 and 2000 elections was "true" issue advocacy. Henderson, J., Supp. App. 242sa-45sa. If that speech affected the election, it did so as the secondary consequence of policy discourse. And those years were, relatively speaking, good times for our country. Certainly we have seen far more tumultuous and contentious times, and BCRA's provisions must provide rules that will fit such times. Defendants' notion that all references to candidates, including incumbent officeholders, could be banned from our nation's primary means of communication for up to half a year would flabbergast the Founding Fathers. (Although John Adams toyed with the concept to his regret in The Alien and Sedition Acts.)

Defendants assert that Members of Congress are "uniquely positioned" to identify speech that influences elections. FECBr. 92. Certainly incumbents are in a position to say that *independent* speech that refers to them is an unpredictable

and unscripted factor and a political challenge that they prefer not to face in seeking reelection. But nothing shows that Congress could or did determine how much of the speech encompassed by the electioneering communication standard poses such an immediate threat of serious evil that the constitutional balance favors suppression. *See supra* p. 10-11.

Defendants argue that the electioneering communication standard is perfectly tailored—because any speech that refers to a candidate during the months prior to an election is "*likely*" to influence the election. FECBr. 24, 72-73 (emphasis added); IntDefBr. 58, 64. This clever rhetorical ploy attempts to obscure the imprecision of BCRA's standard by claiming that its compelling purpose is to identify speech that is likely to cause, to some degree, an effect that, if it were severe enough, might justify suppression. This confuses the issue of tailoring with the issue of compelling interest.

Precision of regulation is the touchstone in this area. *Buckley*, 424 U.S. at 41 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). It is not enough for the Defendants to assert that the core speech suppressed by the electioneering communication standard is likely to have some effect to some degree on some aspect of an election. Instead, Defendants must show that substantially all independent broadcast corporate speech during three to six months of an even-numbered year that so much as refers to anyone who is a federal candidate poses such a serious threat of highly deleterious consequences that suppression is warranted. *See supra* p. 10-11. No such showing has been made.

V. CORPORATE SPEECH DOES NOT OVERSHADOW OTHER SPEECH DURING ELECTION PERIODS.

In a further effort to evade *Buckley* and *MCFL*, Defendants suggest that corporate and union speech unforeseeably has "exploded" to overshadow political discourse during federal campaigns. FECBr. 80-81; IntDefBr. 53-54. They suggest that *Buckley* and *MCFL* could not have foreseen the need to

cast a net broad enough to reach all corporate speech likely to affect an election.

The FEC Defendants bemoan the "spectacular rise" in "candidate-centered" issue advertising by corporations and labor unions, culminating in what they claim to be the expenditure of $500 million during the 1999-2000 election cycle. FECBr. 80. Yet, they cite findings by Judge Kollar-Kotelly based on a study that does not support their position. *See* Annenberg Public Policy Center, Issue Advertising in the 1999-2000 Election Cycle ("Annenberg Study") [DEV 38 Tab 22].

The Annenberg Study does in fact estimate that $500 million was spent on issue advocacy during the entire two-year 1999-2000 cycle; its estimate is *not* based on ads near federal elections. Annenberg Study at 1. Nor is the $500 million estimate limited to funds spent by corporations and labor unions, or "candidate-centered" issue advocacy. Instead, its figures measure all issue advocacy which includes candidate-centered, legislation-centered, and general image-centered advocacy. *Id.* at 13. Roughly one-third of the $500 million was spent by political parties. The remaining two-thirds was spent by approximately 130 other groups, and the Annenberg Study could only conclude that roughly one-quarter of the $500 million was spent by groups that represent corporate interests. *Id.* at 4.

The Annenberg Study shows that many organizations contributed to the $500 million in issue speech from 1999 to 2000. The FEC Defendants' assertion that the $500 million was spent only by corporations and labor unions, and only on candidate-centered speech, is unsupported.

The numbers Defendants cite are part of a general increase in campaign speech by all participants—something that the First Amendment favors—and surely do not show that corporations suddenly are exercising an overwhelming influence. To the contrary, Defendants were unable to contest the Business Plaintiffs' showing (at 38-40) that,

according to Defendants' own data, *recent spending by candidates and parties accounts for the great majority of political speech near elections; independent "organizations" account for a much smaller percentage; and corporations and unions are some fraction of organizational spending (the burden being on Defendants).*[13] Thus, the data show no dramatic sea change since *Buckley* and *MCFL* that would warrant throwing their express advocacy standard overboard.

VI. DEFENDANTS MAKE NO SERIOUS ATTEMPT TO DEFEND BCRA'S BACKUP DEFINITION OF ELECTIONEERING COMMUNICATION.

The three district court judges agreed that BCRA's backup definition of electioneering communication was unconstitutionally vague. Henderson, J., Supp. App. 362sa; Leon, J., Supp. App. 1164sa-66sa; Kollar-Kotelly, J., Supp. App. 885sa-86sa. Judges Leon and Kollar-Kotelly sought to save part of the backup definition by imposing a "broadening construction" that severed and discarded a provision that narrowed the definition with a vague standard. Leon, J., Supp. App. 1164sa-66sa; Kollar-Kotelly, J., Supp. App. 885sa-86sa. However, Judge Leon later conceded that the remaining part of the definition failed to give sufficient "guidance" to stand on its own. Bus. Pls.' Juris. Stmnt. App. 19a.

Defendants do not defend this unprecedented attempt to cure vagueness by expanding the burden on speech. FECBr. 116. Indeed, the Intervenor-Defendants tacitly denounce the backup definition. IntDefBr. 71.

The FEC Defendants argue that the vagueness of the final clause of the backup definition should be excused because its purpose was to benefit speakers by narrowing the definition. FECBr. 117. In fact, clear standards benefit all Americans—

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[13] "Organizations" like the Sierra Club, Emily's List, the NRA, and the like presumably account for a large part of this spending. Whether or not these groups qualify for a technical *MCFL* exemption, the issues that they raise clearly are distinct from those posed by business corporations.

listeners as well as speakers—and they are *required* by the First Amendment, not granted as a matter of grace. Thus, *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048-49 (1991), held that Nevada's rule restricting public statements by lawyers was "void for vagueness" because its "safe harbor provision" was unclear.

VII. BCRA'S "COORDINATION" PROVISIONS ARE INVALID AND SUBJECT TO REVIEW IN THIS ACTION.

Defendants do not dispute that (i) effective participation in developing and implementing legislation and public policy requires business corporations and their representatives to associate and communicate on a long-term, ongoing basis with government and political leaders, many of whom also are federal candidates; (ii) such associating and communicating lies at the core of the First Amendment's protection of speech, association, and petition; (iii) if this association and communication causes future public speech supported by a corporation to be "coordinated" with a candidate or political party, that speech is unlawful and potentially criminal; (iv) political opponents effectively use FEC complaints charging unlawful coordination to punish and deter speech to which they object; and (v) uncertainty over the meaning of coordination is forcing corporations at this moment to curtail their association and communication with government and political leaders to avoid creating a basis for coordination charges that could render their future speech unlawful.

Defendants also do not deny that, because the coordination doctrine substantially burdens core First Amendment activities of speech, association, and petition, it is subject to strict scrutiny, including the elevated standard of clarity that the First Amendment imposes. Nor do they deny that the coordination provisions fail to provide such a clear standard. Instead, they assert that, despite the mandate of BCRA section 403(a)(4) to expedite resolution of constitutional challenges to the greatest extent possible, this Court cannot now address the issue.[14] They are mistaken.

A. BCRA's New Provision Restricting Coordination With Political Parties Clearly Is Subject To Review Now.

BCRA section 214(a) adds a new and distinct provision under which expenditures made "in cooperation, consultation, or concert with, or at the request or suggestion of, a national, State, or local committee of a political party, shall be considered to be contributions." Since corporations cannot make such contributions, this new provision bans corporate expenditures that are coordinated with a political party. Today, corporations are curtailing communication and association with party leaders to avoid future charges of coordination.

The Business Plaintiffs, the AFL-CIO, and others challenged this new provision as unconstitutionally vague, and Defendants do not squarely contest that challenge. Instead, they argue that (i) the new provision uses the same statutory definition of coordination—"in cooperation, consultation, or concert with, or at the request or suggestion of"—that pre-existing provisions used, and (ii) Plaintiffs have not shown that this standard is more vague with respect to political parties than with respect to candidates. FECBr. 123. These two points are both true and irrelevant.

This Court has not approved the prior statutory definition, nor has that standard been implemented without serious difficulty. To the contrary, the prior law spawned uncertainty and dispute, massive burdens on protected speech, and, ultimately, a narrowing construction by a district court and the FEC that sections 214(b) and (c) of BCRA now reject. *See* BPBr. 19-24, 44-46. If anything, the prior uses of this

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[14] The Intervenor-Defendants do not address the coordination issue at all. Presumably they intend to rely on the arguments presented at FECBr. 122-25.

statutory definition demonstrate that it falls far short of the clarity demanded by the First Amendment.

Perhaps BCRA's special judicial review provision may not allow this Court to reach out and strike down pre-existing provisions where the "in cooperation, consultation, or concert with, or at the request or suggestion of" standard appears. But that is no reason to reject Congress's mandate to resolve the constitutional challenge to the provision that clearly is before this Court. This Court regularly evaluates the provisions that are before it without insisting that all related provisions also be at issue. *See, e.g., Buckley*, 424 U.S. at 75-81.

Defendants argue that, in carrying out its duty to promulgate regulations to define coordination, the FEC might "alleviat[e] any uncertainty" as to what the statute means. FECBr. 124. But this Court never has held that the possibility of rulemaking precludes a challenge to the statute. And any such preclusion would be particularly unwise where, as here (i) the challenged statutory provision is self-enforcing, (ii) private parties who have a history of abusing similar provisions are free to file complaints directly under the statute, and (iii) Congress has mandated this Court to resolve such constitutional challenges as swiftly as possible.

Moreover, the content of the FEC's coordination regulations are not a mystery; they were adopted months before the district court ruled. Per Curiam, Supp. App. 155sa. If Defendants thought those regulations saved the statute, they were free to seek an opportunity from the district court to make that demonstration, but they did not. Nor did they respond to the Business Plaintiffs' showing that vagueness remained. BPBr. 46-48.

B. BCRA's Specification That Speech May Be Condemned As A Coordinated Contribution In The Absence Of Any Agreement Is Unconstitutional.

Defendants do not deny that, read as a whole, BCRA sections 214(a)-(c) establish that "coordination" may be

found, and otherwise fully protected independent speech may be condemned as an unlawful contribution, even though there is no element of agreement between speaker and candidate, campaign, or political party. BPBr. 46 n.29, 49. Nor do Defendants make any attempt to explain how such a result can be squared with the basic theory of the coordination doctrine—that spending for speech pursuant to an understanding with a candidate is the functional equivalent of a contribution. BPBr. 44. Instead, Defendants simply assert that "FECA has long provided . . . that expenditures made 'at the request or suggestion of' a candidate will be treated as contributions to that candidate." FECBr. 124-25. Once again, the statement is both true but irrelevant. If FECA's phrase "at the request or suggestion of" did not call for some element of agreement, it was unconstitutional, but that does not change the fact that BCRA's express preclusion of any element of agreement also is unconstitutional for the same reason. *See* Henderson, J., Supp. App. 393sa-94sa.

In fact, the phrase "*at* the request or suggestion of" means something more than a mere temporal sequence; it is different from the phrase "*after* the request or suggestion of." And that difference is the existence of an agreement or understanding. The importance of this point is demonstrated by what happened with The Coalition in the late 1990s. As is described in the Business Plaintiffs' Brief (at 20-21), a key basis for the charge of coordination brought against The Coalition was that, shortly after the AFL-CIO announced its ad campaign, Congressman Boehner gave a public speech in which he supposedly urged business interests to respond. In fact, there was a dispute as to what he said, but, more fundamentally, the members of The Coalition were unanimous that the need for a response was obvious and that, regardless of what Congressman Boehner may have said, they were acting independently and not pursuant to any understanding with him. BPBr. 19-20. In other words, they may have acted after his suggestion, but not "at" his

suggestion. And, once the FEC recognized that the Constitution compelled a narrow construction of "coordination," it dismissed the complaint against The Coalition. BPBr. 23.

This is a critical point. The Business Plaintiffs cannot control the unilateral suggestions and requests that candidates or political parties may make. However, such unilateral action by others should not operate to deprive plaintiffs of their constitutional right to engage in independent speech. Instead, a proper test of coordination must require some element of agreement between speaker and candidate, campaign, or political party.

CONCLUSION

The electioneering communication and coordination provisions of BCRA should be struck down.

Respectfully submitted,

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